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SEE HONG CHEEN

v.

KONSORTIUM PANTAIMAS SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
MOHTARUDIN BAKI JCA
[CIVIL APPEAL NO: B-02-2667-2009]

C

8 MARCH 2012

LAND LAW: *Caveats - Removal of - Whether appellant an aggrieved party - Whether existence of serious issues for trial dictated caveat should remain on register - Whether removal of caveat would tantamount to court approving appellant's illegal dealings - National Land Code, ss. 323(1) & 327*

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The appellant ('See') granted an interest-bearing personal loan of RM3 million to a businessman ('Dato' Gan') after the latter signed several documents and deposited the title deed to a piece of land at See's lawyer's office. Dato' Gan was told by See and his lawyer that the signed documents and the title deed would be kept as security and would be returned to him once the loan was settled with interest. The land was owned by a company ('Luxcourt') in which Dato' Gan was a director. Sometime after Dato' Gan had fully settled the loan with interest, Luxcourt entered into a joint-venture agreement ('JV agreement') with the respondent to develop the land. Dato' Gan was also a director in the respondent company. It was then discovered that See had entered a private caveat on the land in connection with a purported sale and purchase agreement ('SPA') for the land between the appellant and Luxcourt which had not been finalised. Luxcourt filed an action in court to declare that it had never agreed to sell to See the land nor received any monies from him. It sought to declare the purported SPA invalid; to have the private caveat entered by See removed; and for him to pay damages for stalling the development of the land under the JV agreement by the entry of the caveat. Before the trial of that action, See applied to remove a private caveat entered on the land by the respondent under the JV agreement claiming that the existence of that caveat affected his right to have the title to the land registered in his name. The High Court dismissed See's application holding that the *status quo* should be maintained. Against that decision, See appealed to the Court of Appeal. He argued that the court should not be influenced by Luxcourt's civil suit against him in its determination of the appeal.

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Held (dismissing appeal with costs; affirming decision of High Court)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The chequered history surrounding the land could not be swept under the carpet. Luxcourt's suit against the appellant concerned the same land and the factual matrix of its claim was peppered with allegations of fraud although the word 'fraud' was not used. When considering the question whether the respondent had a caveatable interest under s. 323(1) of the National Land Code ('NLC'), one had to consider the factual matrix of Luxcourt's civil suit and when so considered, the respondent had a caveatable interest to lodge the private caveat on the land. (paras 14 & 17)

(2) The chequered history to the land and the fact that the quit rent was paid by Luxcourt showed it had not abandoned its ownership of the land. If the private caveat was allowed to be removed, it would mean that the court was giving its stamp of approval to the illegal money lending transaction undertaken by the appellant. That would not be right. The courts would not enforce contracts tainted with illegality. (para 18)

(3) There were serious questions to be tried and the balance of convenience clearly lay with the respondent to have its private caveat remain on the register. (para 20)

(4) The High Court was right in holding that the issues raised by the respondent were not answered by the appellant and, consequently, that it was doubtful whether the appellant was an aggrieved party within the meaning of s. 327 of the NLC. (para 21)

(5) The appellant merely denied the chequered history pertaining to the land and stressed that the respondent was not a party to the sale and purchase agreement ('SPA') between himself and Luxcourt overlooking the fact that Dato' Gan was a director of both Luxcourt and the respondent. Of pertinence was the fact that the appellant had not filed any action for specific performance of the purported SPA and Luxcourt, as owner of the land, never received the RM3 million from the appellant. (para 19)

Case(s) referred to:
Govindji & Co v. Soon Hin Huat [1981] 1 LNS 158 FC ***(refd)***
Holman Et Al v. Johnson, alias Newland [1775] 1 Cowp 342 ***(refd)***
Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

A *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA* ***(refd)***
Tinsley v. Milligan [1994] 1 AC 340 ***(refd)***
Toko Palayakat Jamal (M) Sdn Bhd v. Soon Seng Company Sdn Bhd [2004] 3 CLJ 32 CA ***(refd)***
Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984]
B *1 CLJ (Rep) 441 FC* ***(refd)***

Legislation referred to:
National Land Code, ss. 323(1), 327

For the appellant - Joseph Yeo; M/s Joseph Yeo
C *For the respondent - Amritpal Singh; M/s Amritpal Singh*

[Appeal from High Court, Shah Alam; Originating Summons No: MT3-24-28-2009]

Reported by Ashok Kumar

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JUDGMENT

Abdul Malik Ishak JCA:

E **[1]** The subject matter in this appeal is a piece of land comprised in GM 430, Lot 154, Daerah Kuala Langat, Mukim Morib, Negeri Selangor Darul Ehsan (hereinafter referred to as the "said land"). The registered owner of the said land is Luxcourt Sdn Bhd (No. Syarikat 113650-K) (hereinafter referred to as "Luxcourt"). Dato' Gan Kim Siong is one of the directors of Luxcourt (hereinafter referred to as
F "Dato' Gan"). Dato' Gan is also a director of the respondent.

[2] In 2004, Dato' Gan was in financial difficulties and he approached See Hong Cheen @ See Hong Chen - the appellant herein, in order to borrow on a personal basis, the sum of RM3 million. In that meeting,
G the appellant agreed to lend RM3 million to Dato' Gan on condition that Dato' Gan enter into an agreement purportedly to protect the appellant's interest by way of a consideration for advancing the loan. Towards this end, the appellant took Dato' Gan to see a lawyer at the lawyer's office of M/s Rajah, Lau & Assocs. In that lawyer's office, Dato' Gan was
H asked to sign several documents and he was also asked to deposit the land title to the said land. Dato' Gan was informed by the appellant and the appellant's lawyer that the documents which he signed and the land title to the said land would be kept as security and that the land title to the said land would be returned to Dato' Gan and all the documents which Dato' Gan signed would also be returned to Dato' Gan once the
I said Dato' had repaid the loan sum of RM3 million together with interest therein.

[3] Dato' Gan was asked to sign several documents prepared by the law firm of M/s Rajah, Lau & Assocs. Luxcourt and Dato' Gan were not advised to seek legal representations and be represented by a lawyer. A

[4] Upon signing the documents, Dato' Gan was handed a sum of RM2,925,000 (a sum of RM75,000 was deducted upfront as interest to the sum of RM3 million loaned). B

[5] Dato' Gan was informed at the office of M/s Rajah, Lau & Assocs that all the documents would be transmitted to him once the documents were stamped. But to date, Dato' Gan was not given those documents that were signed in 2004. C

[6] In 2006, Dato' Gan settled the loan inclusive of interest to the appellant. The repayment of the loan came up to RM3,600,900 wherein the sum of RM600,900 constituted the interest levied by the appellant.

[7] Luxcourt as the registered owner of the said land entered into a joint venture agreement with Konsortium Pantaimas Sdn Bhd (no. syarikat 409124-U) - the respondent herein, in order to develop the said land. On 29 August 2007, the respondent filed a private caveat on the said land *vide* 'nombor perserahan' 1187/2007. It must be recalled to mind that Dato' Gan is one of the directors of Luxcourt. D E

[8] By way of Saman Pemula No: 24-28-2009, the appellant sought to remove the private caveat pursuant to s. 327 of the National Land Code 1965 ("NLC") lodged by the respondent in respect of the said land. F

[9] Now, Luxcourt realised that the personal loan of RM3 million taken by Dato' Gan was dressed up as a cloak by the appellant as a sale and purchase agreement for the said land. Luxcourt did not receive RM3 million from the appellant. Luxcourt averred that the purported sale and purchase agreement for the said land dated 20 April 2004 had not been finalised until now. It has been almost five years down the road. G

[10] Luxcourt also averred that the purported sale and purchase agreement of the said land was designed by the appellant to tie Luxcourt notwithstanding that it concerned a personal loan taken by Dato' Gan. Luxcourt vehemently protested and averred that the said land was never sold to the appellant. H

[11] Luxcourt averred that the said land is valued at RM8.6 million and Luxcourt would not have sold the said land for RM3 million. Luxcourt also averred that the loan transaction of Dato' Gan with the appellant and the documents that were prepared were purportedly done to tie Dato' Gan to the loan by the appellant and in the process of which the appellant had enriched himself. I

[12] Luxcourt had instituted a legal action against the appellant by way of a Civil Suit Number 22-257-2009 and sought for the following prayers:

(i) satu deklarasi bahawa plaintif (Luxcourt) tidak menjual tanah yang terkandung di bawah GM 430 Lot 154, Mukim Morib, Daerah Kuala Langat, Negeri Selangor Darul Ehsan (kemudian ini dipanggil sebagai 'tanah tersebut') kepada defendan (See Hong Cheen @ See Hong Chen) dan plaintif (Luxcourt) tidak menerima wang balasan sebanyak RM3.0 juta yang dikatakan dalam Perjanjian Jual Beli bertarikh 20 April 2004; dan

(ii) satu deklarasi bahawa Perjanjian Jual Beli bertarikh 20 April 2004 di antara plaintif (Luxcourt) dengan defendan (See Hong Cheen @ See Hong Chen) untuk tanah yang terkandung di bawah GM 430 Lot 154, Mukim Morib, Daerah Kuala Langat, Negeri Selangor Darul Ehsan adalah tidak sah dan dibatal; dan

(iii) suatu deklarasi bahawa apa-apa suratcara-suratcara yang disediakan dalam urusan Perjanjian Jual Beli bertarikh 20 April 2004 dianggap tidak sah dan dibatal; dan

(iv) selaras dengan perintah (i), (ii) dan (iii) Tuan Pendaftar Tanah Daerah Kuala Langat hendaklah membatalkan kaveat persendirian yang dimasuki oleh defendan (See Hong Cheen @ See Hong Chen) di bawah nombor perserahan 482/2004 pada 21 April 2004; dan

(v) gantirugi am terhadap defendan (See Hong Cheen @ See Hong Chen) untuk memasuki kaveat ke atas tanah tersebut yang telah menjadi penghalang untuk memajukan tanah tersebut mengikut 'Joint Venture Agreement' bertarikh 8 Ogos 2008 di antara plaintif (Luxcourt) dengan Konsortium Pantaimas Sdn Bhd; dan

(vi) kos tindakan ini; dan

(vii) lain-lain relif yang difikirkan adil dan sesuai oleh Mahkamah yang Mulia ini.

[13] On 26 October 2009, the Shah Alam High Court dismissed the appellant's application pursuant to s. 327 of the NLC to remove the private caveat *vide* presentation number 1187/2007 dated 29 August 2007 which was lodged by the respondent in respect of the said land. The Shah Alam High Court dismissed the appellant's application on the ground that the *status quo* ought to be maintained. Aggrieved by the decision of the Shah Alam High Court, the appellant filed an appeal before this court.

[14] The chequered history surrounding the said land as alluded to above cannot be swept under the carpet, so to speak. Before us, it is argued that the case filed by Luxcourt against the appellant in Civil Suit

Number 22-257-2009 to deny the appellant's entitlement to the said land should not influence this court in determining the present appeal before us. It is further argued that the respondent should leave Luxcourt to fight its own battle.

[15] The appellant says that he is an aggrieved person within the context of s. 327 of the NLC (*Toko Palayakat Jamal (M) Sdn Bhd v. Soon Seng Company Sdn Bhd* [2004] 3 CLJ 32). The appellant also says that he is aggrieved as his right to have the title to the said land registered in his name has been affected by the entry of the private caveat by the respondent. But the appellant's purported right to the said land was created by manipulating the personal loan to Dato' Gan as a sale and purchase agreement of the said land to the appellant.

[16] Luxcourt as the registered owner of the said land is entitled to develop the said land with the respondent. Clause 5 of the joint venture agreement sets out the respective entitlement of Luxcourt as the owner of the said land and the respondent as the developer in the joint venture. Clause 6 of the joint venture agreement allows the respondent to lodge the private caveat on the said land.

[17] The outcome of the civil suit number 22-257-2009 filed by Luxcourt against the appellant would add a different complexion to the present appeal at hand. That civil suit filed by Luxcourt against the appellant concerned the same piece of land - the said land in question. Luxcourt's statement of claim in civil suit number 22-257-2009 against the appellant sets out the factual matrix peppered with allegations of fraud even though the word "**fraud**" was not used. When considering the first crucial question of whether the respondent has a caveatable interest under s. 323(1) of the NLC, one must also consider the factual matrix of Luxcourt's Civil Suit Number 22-257-2009 and when so considered, the respondent here has a caveatable interest to lodge the private caveat on the said land (*Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545).

[18] Since the respondent has a caveatable interest, the next question to pose is whether the evidence produced in support of the respondent's claim discloses a serious question to be tried. The chequered history to the said land and the fact that the "**cukai tanah**" was paid by Luxcourt shows that Luxcourt has not abandoned its ownership of the said land. To compound the matter further, if the private caveat is allowed to be removed as contended by the appellant then it would mean that this court gives its stamp of approval to the illegal money-lending transaction undertaken by the appellant. That cannot be right. It is trite that the courts will not enforce contracts which are tainted with illegality. The

general principle is that illegal contracts are unenforceable (*Holman Et Al v. Johnson, alias Newland* [1775] 1 Cowp 342) and this was affirmed by Lord Goff of Chieveley and Lord Browne-Wilkinson in *Tinsley v. Milligan* [1994] 1 AC 340 at pp. 355 and 363. It is also ideal to read the judgment of Abdul Hamid Omar FCJ (later the Lord President of the Supreme Court) in *Govindji & Co v. Soon Hin Huat* [1981] 1 LNS 158; [1982] 1 MLJ 255 at p. 257 on illegal contracts.

[19] The appellant merely denied as to the chequered history pertaining to the said land and stressed that the respondent was not a party to the sale and purchase agreement of the said land between the appellant and Luxcourt. But the appellant overlooked the positions of Dato' Gan as the director of both Luxcourt and the respondent. Of pertinence is the fact that the appellant has not filed an action to seek specific performance of the purported sale and purchase agreement of the said land. It must be borne in mind that Luxcourt as the registered owner of the said land did not receive RM3 million from the appellant. There was unjust enrichment on the part of the appellant pursuant to the purported sale and purchase agreement of the said land by gaining RM600,900 as interest. Now, unjust enrichment will usually take the form of a benefit accruing to one party which may be regarded as belonging to another. In such a situation the restitutionary remedy would be to restore the benefit back to its "rightful owner". This is often referred to as enrichment by substraction from the claimant (see Peter Birks, *An Introduction to the Law of Restitution, Clarendon Press,* 1989; and *Gerard McMeel, The Modern Law of Restitution,* Blackstone Press, 2000).

[20] Indeed there are serious questions to be tried. And the balance of convenience, the final question to answer, clearly lies with the respondent to have the private caveat to remain on the register. It is always important to consider whether the balance of justice or convenience lies in favour of the private caveat remaining on the register or whether it favours its removal (*Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909, CA). And it is prudent, on the facts of the present appeal, to allow the private caveat to remain on the register. The respondent as the caveator has satisfied the court that it is just for the private caveat to remain on the register (*Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116, FC).

[21] The learned Judicial Commissioner was right when she held that the issues raised by the respondent were not answered by the appellant and, consequently, Her Ladyship was right when she held that it was doubtful whether the appellant was an aggrieved party within the meaning of s. 327 of the NLC. Moreover, "**under s. 327 of the**

National Land Code the court's power is discretionary" (per Hashim Yeop A Sani FJ in *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC; [1984] 2 MLJ 113 at p. 115).

[22] For these reasons, we unanimously dismissed the appellant's appeal with costs of RM5,000. We affirmed the decision of the learned Judicial Commissioner. Deposit should rightly be given to the respondent.